IN THE

Supreme Court of the State of Michigan

On Appeal From The Michigan Court Of Appeals
Whitbeck, C.J., And Fitzgerald And Markey, JJ.

LINDA M. GILBERT,

Plaintiff-Appellee,

v.

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

Supreme Court
Case No. 122457

Court of Appeals
Docket No. 227392

Circuit Court (Wayne County)
Case No. 94-409216-NH
The Honorable John A. Murphy

REPLY BRIEF ON APPEAL—APPELLANT

ORAL ARGUMENT REQUESTED

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DaimlerChrysler Corporation's opening merits brief demonstrated in detail, citing a multitude of on-point judicial precedents, why the gigantic, record-smashing judgment in this case is unlawful and cannot stand. In response, Linda Gilbert has presented a brief that is all adjective and no noun, misrepresenting the record, mischaracterizing DaimlerChrysler's arguments, and in nearly every respect avoiding the important legal issues before this Court. When one cuts through Ms. Gilbert's fog of misdirection and emotive rhetoric, the result is clear: the judgment must be reversed, and DaimlerChrysler is entitled to judgment notwithstanding the verdict or, in the alternative, a new trial on all issues, or at the very least a substantial remittitur.

I. The Record Is Insufficient To Support A Finding Of Sexual Harassment Under The Elliott-Larsen Civil Rights Act

1. In June of this year, this Court decided *Haynie v. State*, 468 Mich. 302, 664 N.W.2d 129 (2003), holding that "conduct or communication that is gender-based, but is not sexual in nature, does not constitute sexual harassment as that term is clearly defined in the CRA." 664 N.W.2d at 131. As this Court concluded, "[i]t is clear from this definition of sexual harassment that only conduct or communication that is sexual in nature can constitute sexual harassment, and thus conduct or communication that is gender-based, but that is not sexual in nature, cannot constitute sexual harassment." *Id.* at 135.[1]

Throughout this case, Ms. Gilbert has alleged no physical touching, no propositioning for sex, no retaliation for complaining to management, and no constructive termination. Instead, her theory has been that her male co-workers did not want a female millwright working in the plant

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[1] The lower courts have applied *Haynie* to pending appeals. *See, e.g.*, *Stanisz v. Fed. Express Corp.*, No. 236371, 2003 WL 21660885, at *8-9, *11 (Mich. Ct. App. July 15, 2003) (routine reference to plaintiff as "bitch," along with "chauvinistic remarks" and "very foul and rude language" was gender-based and not of a sexual nature as a matter of law in light of *Haynie*); *Paige v. Detroit Edison Co.*, Nos. 235644 et al., 2003 WL 21752809, at *2-3 (Mich. Ct. App. July 29, 2003) (applying *Haynie* to pending case).

and thus ostracized her and made the working experience difficult for her because of her gender: i.e., gender harassment. Indeed, in her brief Ms. Gilbert reaffirms that this is her theory of the case, contending that the workplace involved "virulent misogyny" on the part of co-workers purportedly engaged in an "effort to drive Plaintiff from the workplace." Opp. Br. at 15. *See also id.* at 55 (conduct allegedly "intended to harass, offend, and drive women from the plant"); Br. at 43 n.30 (listing the eleven alleged incidents in the record with even arguably a sexual overtone).

Remarkably, Ms. Gilbert chooses to ignore *Haynie* entirely, failing to cite it even once. Instead, she tries to duck the issue by asserting—erroneously—that whether the allegations in this case are of a "sexual nature" is an issue "not offered by any party." Opp. Br. at 21 n.13. To the contrary, DaimlerChrysler raised this exact issue in its opening brief, addressing the then-pending *Haynie* case explicitly. Br. at 31-34, 42-43. The record unambiguously demonstrates that DaimlerChrysler has always maintained, in the lower courts and in this Court, that the various incidents at issue, and particularly the "14,994" unreported incidents, did not constitute legally sufficient evidence to support a sexual harassment claim. This issue is plainly preserved for appellate review as within the scope of DaimlerChrysler's challenge to the sufficiency of the evidence.

2. Ms. Gilbert's misleading list of the alleged harassment in fact demonstrates the insufficiency of the evidence to support a judgment in her favor for "sexual harassment" under *Haynie*. At pages 5-12 of her brief, Ms. Gilbert purports to list sixteen "specific incidents" of harassment, which are then echoed in part at pages 20-21 and throughout her brief. Aside from giving many of those incidents gratuitously lurid but misleading titles having nothing at all to do with the record, Ms. Gilbert's list consists primarily of allegations that are plainly not sexual in

nature and that, in any event, were not reported until many months or years after the fact.[2] The correct sequence of events, including the absence in most instances of a timely complaint to DaimlerChrysler as well as the fact that the reported incidents occurred on different shifts under different circumstances, usually separated by many months, is set forth in DaimlerChrysler's brief at pages 6-12. *See also* Attachment A hereto (noting the allegations, when they were reported, and the company's response). Indeed, Ms. Gilbert repeatedly quotes at length from the opinion of the Court of Appeals, rather than from the evidence itself, even though DaimlerChrysler has set forth in minute detail the many ways in which that opinion deviates from the evidence. *See, e.g.*, Reply Br. in Supp. of Appl. for Leave to Appeal, Attachment A at 18. It is quite telling that at no stage of the briefing before this Court has Ms. Gilbert even attempted to rehabilitate the opinion of the Court of Appeals, thus acknowledging the correctness of DaimlerChrysler's analysis demonstrating the numerous material mischaracterizations of the record in that opinion.

Ms. Gilbert claims that she "wept openly over 100 times" (Opp. Br. at 3), implying that DaimlerChrysler had notice, but the cited testimony clearly states that the crying occurred "on the way home" from work, not *at* work. 712a. She likewise attempts to perpetuate the myth that DaimlerChrysler "did nothing" in response to her complaints, including "no effort at all to discipline" any alleged harassers. Opp. Br. at 4, 15. The undisputed evidence, however, is to the

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[2] For example, the third item is captioned "Show Us Your Muscles," but nothing in the record suggests that anyone at DaimlerChrysler asked or otherwise wanted Ms. Gilbert to display any part of her anatomy. In fact, Ms. Gilbert admitted that having items blocking one's tool box happened to *all* employees, but when it happened to her she merely chose to take it personally. *See* Br. at 32 n.21, 898a-899a. Likewise, the twelfth item is captioned "Piss On Your Lawsuit," but again, there is no evidence that anyone ever uttered that phrase or anything even remotely similar to it. This technique of confusing advocacy with evidence appears throughout Ms. Gilbert's brief. Moreover, the ninth and fifteenth items refer not to alleged harassment at all, but rather to DaimlerChrysler's response, which Ms. Gilbert misleadingly describes in one instance as "Move The Victim," even though *she* requested that transfer. *See* Br. at 8 n.3.

contrary. *See* Br. at 6-9 (detailing, with record cites, DaimlerChrysler's investigations and formal discipline of the only identified harasser). The long and the short of the matter is that Ms. Gilbert's brief is largely a work of aggressive distortion and, at times, outright fiction. Despite her continued attempts to depict the facts as the worst case of sexual harassment ever, even the badly misled and confused Court of Appeals correctly noted that this case is "low[] on the continuum of harassment." 75a.

3. Ms. Gilbert fails to respond to DaimlerChrysler's argument that she did not provide the company with timely and adequate notice of all but the six reported incidents. Instead, Ms. Gilbert misleadingly asserts that "[w]ith few exceptions, the liability evidence was admitted without objection." Opp. Br. at 18 n.11.[3] To the contrary, DaimlerChrysler moved in limine to exclude all evidence regarding unreported incidents. *See* Br. at 10 n.4, 345a-372a. Ms. Gilbert also continues to peddle the falsehood that one of her supervisors allegedly told her not to report misconduct, and thus that her failure to give DaimlerChrysler notice of purported harassment is somehow excused. Opp. Br. at 27, 30. In reality, Ms. Gilbert misleadingly contorts one incident in which a *non-sexual* cartoon was taped to Ms. Gilbert's tool box, with the word "bitch" written on the tape. Her supervisor did *not* tell her not to complain, but rather encouraged her not to "let the guys know this bothers you, and it may stop." 910a-911a. Indeed, Ms. Gilbert used DaimlerChrysler's complaint procedure *five times* thereafter, negating any possible inference that she viewed this one comment as an instruction not to use the company's complaint procedure.

Ms. Gilbert then casually asserts that "'notice' to a living employee is 'notice' to the inanimate corporate employer." Opp. Br. at 25. She fails to cite, much less to discuss or to at-

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[3] Ms. Gilbert likewise claims, incorrectly, that "[t]here was no objection to the liability instructions." Opp. Br. at 28. *But see* 1174a-1189a (objections to liability instructions).

tempt to distinguish, the holding in *Sheridan v. Forest Hills Public Schools*, 247 Mich. App. 611 (2001), *leave denied*, 466 Mich. 888 (2002). *Sheridan* requires that notice of sexual harassment be provided to "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision making process of hiring, firing, and disciplining the offensive employee"—i.e., higher management—before an employer can be deemed to have notice for purposes of Michigan's fault principle. 247 Mich. App. at 622-23. DaimlerChrysler cited and discussed *Sheridan* extensively in its brief (*see, e.g.*, Br. at 28-30, 39), yet Ms. Gilbert elects not to cite it, much as she ignores *Haynie* and, apparently, any other Michigan case that is contrary to her position. Ms. Gilbert's assertion that notice to any employee at all in a 5,000-employee manufacturing plant, at whatever level, is sufficient to place an employer on notice of sexual harassment for purposes of Elliott-Larsen is flatly contrary to *Sheridan*, and Ms. Gilbert offers no principled basis for overturning Michigan law in this regard.

Likewise, Ms. Gilbert's suggestion that notice need not be given until *after* the commencement of a lawsuit is flatly inconsistent with the rule that employers are not liable for sexual harassment in Michigan absent a showing of *fault*, which requires among other things notice and a failure to respond adequately. *See, e.g.*, *Chambers v. Trettco, Inc.*, 463 Mich. 297, 312, 313, 316 (2000). Ms. Gilbert's "sue first and ask questions later" approach is barred by *Chambers*, and it inappropriately countenances subversion of employers' internal complaint mechanisms.[4]

4. Ms. Gilbert essentially fails to respond to DaimlerChrysler's argument, at pages 35-39 of its brief, that she did not carry her burden of proving that the company took prompt and ade-

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[4] Ms. Gilbert's argument that DaimlerChrysler claimed that depositions were part of its investigation (Opp. Br. at 26) ignores the context of what was said. 883a-888a. DaimlerChrysler has always disputed the adequacy of the "notice" purportedly provided by means of deposition testimony months or years after the alleged incidents, and it has never in any way conceded that statements to its outside litigation counsel could constitute "notice" under *Chambers*.

quate remedial action. At most, Ms. Gilbert falsely contends, as noted above, that DaimlerChrysler "did nothing" and that one of DaimlerChrysler's employees supposedly "conceded" the inadequacy of DaimlerChrysler's response. Opp. Br. at 32-33. In fact, DaimlerChrysler fully investigated every incident of which it had timely notice (*see* Br. at 6-9), and the employee who supposedly admitted the inadequacy of the company's actions unambiguously testified that "I thought we did what was adequate." 456a. Ms. Gilbert herself did not contradict this evidence, instead merely claiming a lack of knowledge regarding what actions the company took. 821a.

Ms. Gilbert also misleadingly cites two Michigan cases to imply that the only course of conduct for an employer presented with an allegation of sexual harassment is to terminate the alleged harasser, a rule that for obvious reasons has never been adopted by any jurisdiction. Opp. Br. at 31 n.14. In fact, neither case stands for such a proposition, each merely affirming summary judgment for the employer where, among other things, the employer fired the alleged harasser after a contemporaneous complaint from the plaintiff. *See Downer v. Detroit Receiving Hosp.*, 191 Mich. App. 232, 235 (1991); *Langlois v. McDonald's Restaurants of Mich., Inc.*, 149 Mich. App. 309, 311 (1986) (holding that employee failed as a matter of law to establish hostile environment where on one occasion a co-employee propositioned her for sex, moved his hips in a crude manner, and touched her breast and buttocks).[5]

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[5] Ms. Gilbert also attempts to create "party admissions" out of the fact that one lay witness testified that he would consider a vulgar cartoon to constitute, in Ms. Gilbert's attorney's words, "an act of sexual harassment." Opp. Br. at 23; 494a-495a. As courts have repeatedly held, however, statements regarding legal conclusions by lay witnesses are irrelevant and do not constitute admissions. *See, e.g., EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 804 (9th Cir. 2002) (lay employee's use of term "disabled" not probative for purposes of disability discrimination claim).

II. The Blatant Misconduct Of Ms. Gilbert's Counsel Requires, At A Minimum, Reversal And A New Trial

1. Ms. Gilbert all but refuses to engage DaimlerChrysler's argument regarding attorney misconduct, declining to discuss substantively such crucial cases as *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97 (1982), *Badalamenti v. William Beaumont Hospital—Troy*, 237 Mich. App. 278 (1999), and *Powell v. St. John Hospital*, 241 Mich. App. 64 (2000). Instead, she prefers to quote at length from the deeply flawed Court of Appeals opinion, contending in effect that attorney misconduct should evade appellate review. Opp. Br. at 39. She also mischaracterizes DaimlerChrysler's argument as focusing on "single words or phrases" and contends that DaimlerChrysler somehow *provoked* misconduct. Opp. Br. at 41, 43 & n.26. DaimlerChrysler quite clearly has challenged entire lengthy passages of Mr. Fieger's closing argument, however, as well as numerous other aspects of his trial misconduct, including his gross misrepresentation of his relationship with "expert" witness Mr. Hnat, and there is no record support whatsoever for the assertion that DaimlerChrysler in any way "provoked" Mr. Fieger's antics. Br. at 14-18.

2. Ms. Gilbert contends that it is "permissible advocacy" in a case where punitive damages are not available to argue that the jury should act as the "voice of the community" with a verdict that will deter and punish DaimlerChrysler. Opp. Br. at 42-43. Although some older Michigan decisions seem to regard such arguments as not necessarily improper, including *Elliott v. A.J. Smith Contracting Co.*, 358 Mich. 398, 418 (1960), more recent decisions note that the real question is whether such arguments were intended to "inject issues into the trial broader than those pled and brought out by the testimony," in which case such arguments are improper. *Kubisz v. Cadillac Gage Textron, Inc.*, 236 Mich. App. 629, 642 (1999) (quotation omitted). These arguments were clearly improper and, particularly in light of the other misconduct, as well as the enormous judgment, require a new trial if judgment for DaimlerChrysler is not ordered.

III. The Erroneous Admission Of "Expert" Medical Testimony From A Social Worker, Coupled With The Exclusion Of Proper Rebuttal Testimony, Prejudiced DaimlerChrysler And Requires A New Trial

1. Recognizing the absolute lack of authority for Mr. Hnat to render the medical testimony presented in this case, and indeed the overwhelming body of precedent *against* the admission of that evidence discussed at length in DaimlerChrysler's brief at pages 56-61, Ms. Gilbert argues primarily that DaimlerChrysler has waived this issue.[6] Opp. Br. at 46. Ms. Gilbert is wrong for several reasons. First, and perhaps most obviously, the lower courts did not consider this issue waived and addressed it at length (24a-29a, 89a-91a), thereby providing this Court with ample basis for review. Second, Ms. Gilbert tells only part of the story with regard to DaimlerChrysler's objections to Mr. Hnat's testimony. At 603a-607a, there is a lengthy discussion about Mr. Hnat's competence to render medical opinions. That colloquy occurred in connection with whether certain records could be admitted, but the implications of the Court's ruling for the rest of Mr. Hnat's testimony were obvious and understood by all parties. Moreover, at 609a, DaimlerChrysler again objected to Mr. Hnat's testimony, this time on the ground that "[h]e is now testifying about psychological diagnosis, and that is outside the realm of this witness's expertise." DaimlerChrysler has clearly preserved its challenge to the admission of Mr. Hnat's testimony.

2. Ms. Gilbert's arguments regarding Ms. Katz and Dr. Griffin are no less flawed. With regard to Ms. Katz, DaimlerChrysler's point is that allowing her testimony underscores the unfairness in admitting Mr. Hnat's testimony while barring Dr. Griffin's. As for Ms. Gilbert's allegation that DaimlerChrysler made no offer of proof regarding Dr. Griffin's testimony (Opp. Br.

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[6] Contrary to Ms. Gilbert's depiction, Mr. Hnat's testimony went far beyond merely "reveal[ing] contents of medical records" (*see* Opp. Br. at 48) and instead involved significant amounts of opinion and interpretation. No doctor, for example, concluded that Ms. Gilbert was dying, let alone that she was dying as a result of sexual harassment.

at 53-54 & n.31), Ms. Gilbert ignores the plain language of MRE 103(a)(2), which provides that a claim of error in excluding testimony is preserved when "the substance of the evidence was made known to the court by offer *or* was apparent from the context." MRE 103(a)(2) (emphasis added). Here, there was no doubt at all regarding the substance of Dr. Griffin's proposed testimony, because the court heard extensive argument before precluding DaimlerChrysler from presenting her testimony, and Ms. Gilbert does not argue otherwise. 1079a-1091a. Again, the lower courts did not consider these issues waived and instead addressed them on the merits. A new trial is necessary.

IV. The Excessive Damages Award Violates Michigan Law And The Due Process Clause Of The Fourteenth Amendment To The United States Constitution

Aside from repeatedly mischaracterizing DaimlerChrysler's argument as calling for damages "caps," Ms. Gilbert offers no real response to DaimlerChrysler's demonstration (Br. at 66-75) that the judgment is grossly excessive and must be reversed.[7] Ms. Gilbert ignores the many comparable cases cited by DaimlerChrysler (Br. at 71-74), and she posits only absurd and irrelevant comparisons, such as the compensation of chief executive officers of other corporations.

Ms. Gilbert also cites settlements in two sexual harassment *class actions*—while shamefully failing to disclose that they were class actions, not single-plaintiff cases—involving average *individual* awards of less than *$70,000* and less than *$9,000*. Opp. Br. at 70-71. Andy Kravetz, *Mitsubishi Poised for Payment in Settlement: 486 Women Will Split $34 Million with Judge's*

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[7] Although DaimlerChrysler did not raise a *federal* due process excessiveness challenge below, there is no dispute that the state-law challenge is preserved. Moreover, this Court plainly has discretion to consider constitutional issues on appeal in the interests of justice. *See, e.g.*, *People v. Duranseau*, 221 Mich. App. 204, 205 (1997) ("Defendant did not raise this issue at trial. However, because this issue involves an important constitutional claim, we deem review appropriate."); *Allison v. City of Southfield*, 172 Mich. App. 592, 599 (1988) (exercising discretion to consider constitutional issue where "all necessary facts have been established of record").

OK, Peoria Journal Star, June 22, 1999, at B5; *Ford Will Pay $9 Million to Settle Women's Sexual Harassment Suits*, L.A. Times, Nov. 19, 2000, at A27.[8] If those class actions are the most relevant comparisons that Ms. Gilbert can muster, then remittitur should be entered accordingly.[9]

Finally, Ms. Gilbert relies on the *wealth* and *financial performance* of DaimlerChrysler (Opp. Br. at 70-71), factors often seen as relevant to a *punitive* damages award, but that have long been forbidden in assessing *compensatory* damages. *See, e.g., Randall v. Evening News Ass'n*, 97 Mich. 136, 140 (1893); *Peisner v. Detroit Free Press*, 68 Mich. App. 360, 369-70, 372 (1976). Indeed, Ms. Gilbert herself admits that the judgment here constituted "retribution" (Opp. Br. at 15), thereby conceding that what the jury did here was to punish DaimlerChrysler rather than to award compensatory damages. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003) ("Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' *By contrast*, punitive damages serve a broader function; they are aimed at deterrence and *retribution*." (citation omitted, emphases added)). The judgment is unlawfully excessive and must be reversed for a new trial on all issues, or at least a drastic remittitur.

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[8] Ms. Gilbert persists in contending, as she did at the Application for Leave stage, that Ford settled *two* class actions, not one, citing a purported *Detroit Free Press* article. Opp. Br. at 71. DaimlerChrysler has previously demonstrated, however, that Ms. Gilbert's citation is undeniably erroneous and that only one Ford class action was settled (*see* Reply Br. in Supp. of Appl. for Leave to Appeal at 9 n.10), so Ms. Gilbert's present misstatement can only be viewed as willful.

[9] Ms. Gilbert's argument that "[i]t is illogical to deny a person who sustained $1,000,000 a year in economic losses full compensation just because other 'comparable' reported cases involved annual income losses of $20,000" (Opp. Br. at 64) highlights the fundamental difference between economic and non-economic damages. For economic losses, the evidence itself will contain an upper and lower bound, and thus an excessive verdict is easy to detect, rendering a comparative review process unnecessary. With noneconomic damages, however, the damages are subjective and standardless, lacking any clear upper bound in the evidence itself, so a comparative analysis is perhaps the *only* way to engage in meaningful review for excessiveness.

Respectfully submitted,

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ATTACHMENT A

PLAINTIFF'S CATALOG OF HARASSMENT ALLEGATIONS

	Allegations from pp 37-38 of Plaintiff's Brief	Reported/Response
Sexually Offensive Written Materials Anonymously Left in Plaintiff's Work Area	▸ Cartoon depicting Gilbert with a male co-worker about to engage in oral sex	▸ Reported internally 5/25/93, investigated immediately
	▸ Polaroid "photo" of male genitalia	▸ Reported internally 6/5/93, investigated in conjunction with ongoing fellatio cartoon investigation
	▸ A vulgar "cartoon " entitled "Highway Signs You Should Know"	▸ Reported internally 10/94, investigated immediately
	▸ A vulgar poem entitled "Creation of a Pussy" placed on a bulletin Board	▸ Reported internally 3/95, investigated immediately
Material Available at Most Newsstands	▸ Dr. Ruth column entitled "Ten Times a Day Is Too Many"	▸ Reported internally 10/94, investigated immediately
	▸ Penthouse magazine left lying on her tool box	▸ Not reported internally, raised in Gilbert's 11/94 deposition, several months after the fact
	▸ Magazine open to the article "Why Men Have So Many Sperm"	▸ Not reported internally, raised in Gilbert's 11/94 deposition, several months after the fact
Urine on Chair	▸ Having her chair urinated on	▸ Not reported internally, raised in 11/94 deposition, months after the fact and described at time as an unknown liquid, not urine; chair discarded prior to deposition; described as urine 5 years later at trial
Offensive Comments Made by Co-Workers	▸ Being told, "I can't wait to see you wear a dress and I will hold the ladder"	▸ Incident allegedly occurred offsite in 3/92; not reported internally, raised at 11/94 deposition; only identifying information provided was that the individual was one of 4/5 employees sitting behind her
	▸ Repeatedly being called a "fucking cunt" and "bitch"	▸ Not reported internally, first raised at trial
An Anonymous Sign Attached to her Work Area	▸ Having a sign with the word "Bitch" attached to her work area	▸ Incident occurred in early 93; first time an offensive writing found by Gilbert; discussed with her supervisor, Castleman, who advised that if she acted like it did not bother her it likely would not recur
One Instance of a Profanity Directed at her by a Supervisor	▸ Being told to "clean your fucking ears out"	▸ Not reported internally, raised in Gilbert's 11/94 deposition several months after the fact; no indication whether higher management overheard comment or was aware of it
One Offensive Co-Worker Comment Reported Internally	▸ Being told by a co-worker repeatedly about his "big piece of meat"	▸ Reported internally 9/2/97; Gilbert identified perpetrator (first time in any report); incident immediately investigated and perpetrator was disciplined; no further incidents with this employee